Hock Choo Hoe Sdn Bhd v Public Prosecutor

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 36 OF 1992
STEVE SHIM J
23 DECEMBER 1993

Trademarks *— False trade description — Whether statutory defence under s 24(3) of the Trade Descriptions Act 1972 available to a corporation — Effect of proviso in s 24(1) of the Trade Descriptions Act 1972 — Trade Descriptions Act 1972 s 24(1) & (3)*

Trademarks *— False trade description — Statutory defence in s 24(3) of the Trade Descriptions Act 1972 — Conditions to be fulfilled — Burden on person invoking defence to establish that conditions met — Proof on balance of probabilities — Trade Descriptions Act 1972 s 24(3)*

The appellant had been convicted by the magistrates' court of supplying 18,400 litres of adulterated petrol under the false trade description of 'Formula Shell Regular', an offence under s 3(1)(b) of the Trade Descriptions Act 1972 ('the Act') and was fined RM12,000. The appellant's grounds of appeal, inter alia, alleged that the magistrate had failed to consider or consider adequately the statutory defence provided by s 23(4) of the Act or, more specifically, that she had erred in law and on the evidence in holding that the appellant had not exercised reasonable diligence under s 24(3). The prosecution, however, submitted that the appellant, being a corporate body, could not avail itself of the statutory defence under s 24(3), and in support, drew attention to the restriction provided for in s 24(1) of the Act.

Held, allowing the appeal:

(1) It is clearly evident from the proviso in s 24(1) of the Act that the restriction is confined to the defences in s 24(1) and therefore, the statutory defence under s 24(3) was available to the appellant.

(2) The statutory defence under s 24(3) requires two conditions to be fulfilled, namely, that: (i) the offender did not know the falsity of the trade description; and (ii) he could not with reasonable diligence have ascertained that the goods did not conform to the description or that the description had been applied to the goods. What is reasonable diligence is a question of fact and depends on the particular circumstances of each case.

(3) As the appellant had invoked the statutory defence under s 24(3) of the Act, the burden was on the appellant to establish by way of evidence and on the balance of probabilities, that the two conditions had been met.

(4) There was nothing to indicate or suggest that the appellant was or should have been suspicious that the petrol stored in the underground tank could or might have been contaminated with diesel. Although the magistrate held that the appellant, by not taking any further steps or making any further inquiries to ascertain

A that the petrol conformed with the trade description and by merely relying on its suppliers, had failed to exercise reasonable diligence, she had failed to indicate what those further steps or inquiries entailed. Therefore, she had failed to consider or consider adequately the statutory defence under s 24(3) of the Act.

B **[Bahasa Malaysia summary**

Perayu telah disabit oleh mahkamah majistret kerana membekalkan 18,400 liter minyak petrol dilancung di bawah perihal dagangan palsu 'Formula Shell Regular', suatu kesalahan di bawah s 3(1)(b) Akta Perihal Dagangan 1972 ('Akta itu') dan telah didenda RM12,000.
C Alasan rayuan perayu mengatakan, antara lain, bahawa majistret telah gagal mempertimbangkan atau mempertimbangkan secukupnya pembelaan statutori yang diperuntukkan oleh s 23(4) Akta itu atau, dengan lebih spesifik, bahawa beliau telah membuat kesilapan undang-undang dan keterangan dengan memutuskan bahawa perayu gagal
D menggunakan usaha wajar di bawah s 24(3). Tetapi, pihak pendakwa berhujah bahawa perayu, yang merupakan suatu badan korporat, tidak boleh menggunakan pembelaan statutori di bawah s 24(3), dan sebagai menyokong hujah ini, menarik perhatian kepada sekatan yang diperuntukkan di bawah s 24(1) Akta itu.

E **Diputuskan,** membenarkan rayuan itu:

(1) Memang jelas daripada proviso di dalam s 24(1) Akta itu bahawa sekatan itu terhad kepada pembelaan di dalam s 24(1) dan oleh itu, pembelaan statutori di bawah s 24(3) boleh digunakan oleh perayu.

F (2) Dua syarat perlu dipenuhi bagi pembelaan statutori di bawah s 24(3), iaitu bahawa: (i) pesalah tidak tahu akan kepalsuan perihal dagangan itu; dan (ii) beliau tidak boleh memastikan dengan usaha wajar bahawa barangan itu tidak selaras dengan perihal itu atau bahawa perihal itu terpakai kepada barang itu. Apa yang merupakan usaha wajar adalah suatu soalan fakta dan
G bergantung kepada keadaan tertentu setiap kes.

(3) Oleh kerana perayu telah menggunakan pembelaan statutori di bawah s 24(3) Akta itu, beban terletak pada perayu untuk menunjukkan melalui keterangan dan atas imbangan kebarangkalian, bahawa kedua-dua syarat itu telah dipenuhi.

H (4) Tidak terdapat apa-apa untuk menunjukkan atau mencadangkan bahawa perayu telah atau sepatutnya mensyaki bahawa minyak petrol yang disimpan di dalam tangki bawah tanah itu telah atau mungkin telah dilancung dengan disel. Walaupun majistret telah memutuskan bahawa perayu, dengan tidak mengambil langkah lanjut atau membuat pertanyaan lanjut untuk memastikan bahawa
I minyak petrol itu selaras dengan perihal dagangan dan dengan hanya bergantung kepada pembekalnya, telah gagal menggunakan usaha wajar, beliau gagal menunjukkan apa yang terlibat dalam langkah atau pertanyaan lanjut itu. Oleh itu, beliau telah gagal

mempertimbangkan atau mempertimbangkan secukupnya pembelaan statutori di bawah s 24(3) Akta itu.]

Notes

For cases on false trade descriptions, see 12 *Mallal's Digest* (4th Ed) paras 887–888.

Case referred to

1 *Ang Seng Ho v PP* [1991] 3 MLJ 334 (distd)

Legislation referred to

Trade Descriptions Act 1972 s 24(1), (3)

Dr Chew Peng Hui (*Battenberg & Talma*) for the appellant.

Mohd Ridhuwan bin Rasol (Deputy Public Prosecutor) for the public prosecutor.

Cur Adv Vult

Steve Shim J: This is an appeal by Hock Choo Hoe Sdn Bhd ('the appellant') against conviction by the Magistrates' Court, Sibu, upon a charge which reads as follows:

> That you on 6 August 1988 at 11.30am at the premises of Hock Choo Hoe Sdn Bhd, Shell filling station, Channel Road, Sibu, in the District of Sibu, Sibu Division, in the state of Sarawak, in the course of business did offer to supply 18,400 litres of petrol, to which a false trade description, namely, 'Formula Shell Regular' was applied, whereas in actual fact the petrol was adulterated with 2.1% diesel and that you have thereby committed an offence under s 3(1)(b) of the Trade Descriptions Act 1972 and punishable under s 18(2) of the said Act.

The magistrates' court thereupon imposed a fine of RM12,000 on the appellant. The appellant is also appealing against sentence. In respect of the conviction, the appellant had advanced six grounds of appeal. Dr Chew, for the appellant has, for the most part, concentrated on the second ground which alleges that the learned magistrate had failed to consider or consider adequately the statutory defence provided by s 23(4) of the Trade Descriptions Act 1972 ('the Act') or, more specifically, that she had erred in law and on the evidence in holding that the appellant did not exercise reasonable diligence under the said s 24(3). Now, s 24(3) stipulates that:

> In any proceedings for an offence under this Act of supplying or offering to supply goods to which a false trade description is applied it shall be a defence for the person charged to prove that he did not know, and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.

Quite clearly, the statutory defence requires two conditions to be fulfilled, namely: (i) that the offender did not know the falsity of the trade description; and (ii) that he could not with reasonable diligence have ascertained that the goods did not conform to the description or that the description had been applied to the goods. What is reasonable diligence is a question of fact.

A Whether there is reasonable diligence or not must conceivably depend on the particular circumstances of each case.

Here, the appellant had invoked the statutory defence under s 24(3) of the Act and the learned magistrate, quite rightly I think, came to the view that the burden was on the appellant to establish by way of evidence and on the balance of probabilities, that the two conditions had been met. She held B that the appellant had not done so. She found that the appellant, by not taking any further steps or making any further inquiries to ascertain that the petrol it was offering to supply conformed with the trade description and by merely relying on its suppliers, Shell, had failed to exercise reasonable diligence. The learned magistrate did not, however, state what those further C steps or inquiries were. This was rather unfortunate. Nevertheless, at least two possible inferences could be discernible therefrom.

First, it was quite possible that the learned magistrate was suggesting that the appellant should have tested the petrol stored in its underground tank for diesel contamination at site. If so, it would have been necessary to consider the evidence of Betty Ling (PW3), the manageress of the appellant, D who testified that she did not know of the contamination until she was informed of it by the Ministry nor had she received any complaints about the matter. There was also the evidence of Chang Choong Kong (PW4), the technical manager of Shell, who testified that there were three ways of testing petrol for diesel contamination, namely, by distillation, by research E on number (RON) and by blotting paper. It would appear that tests by distillation and RON had to be conducted in a laboratory and in any case, all the three tests would require professional experience or expertise. According to PW4, none of these tests had been prescribed by Shell to the appellant. What was prescribed was the dip test (as Betty Ling, PW3, called it) which was a means for testing water contamination in the petrol. This F was apparently done in this case. Given such evidence, any suggestion that the appellant should have tested the petrol for diesel contamination at site would have been quite untenable or unreasonable.

Secondly, it was also possible that the learned magistrate was suggesting that the appellant should have sent or should have made arrangements to G send samples of that petrol to the chemistry department so that they could be chemically tested for contamination. If this be so, then it would have been necessary to examine whether, in the light of the evidence adduced, such a course of action was reasonable in all the circumstances. In this connection, the chemist report, produced and marked as exh P7, would have been significant. Looking at exh P7, it would seem that there was a H lapse of at least four months before the result of the chemical test on the petrol samples was known. Such a long lapse must conceivably have adverse effects upon the business of the appellant because business would have to be halted or suspended pending the result of the test or tests. Then, of course, there was the added difficulty of ascertaining the quantity of samples I needed to be supplied for testing purposes since there was a complete absence of any guidelines on the matter. It should also be noted that there was nothing to indicate or suggest that the appellant was or should have been suspicious that the petrol stored in the underground tank could or might have been contaminated with diesel at all material times since the

petrol was supplied by Shell, a very reputable company, with which the appellant had been dealing for many years. Besides, Shell was also responsible for transporting the petrol from its refinery to the station.

In the light of these factors, any suggestion that samples of the petrol in question should have been sent to the chemistry department to be chemically tested would not have been a practicable nor reasonable course of action for the appellant to take in the particular circumstances of this case.

The learned deputy public prosecutor has submitted that the appellant, being a corporate body, could not avail itself of the statutory defence under s 24(3) of the Act. In support, he has drawn attention to the restriction provided for in s 24(1). With respect, I am unable to agree. In my view, the restriction (to use the term loosely) is confined to the defences in s 24(1). This is clearly evident from the proviso therein which states:

> Provided that where a body corporate is charged with an offence under this Act, such body corporate shall not be entitled to rely on the defence *referred to in this subsection.* (Emphasis added.)

In coming to the conclusion that the appellant had not exercised reasonable diligence in this case, it would appear that the learned magistrate was, to some extent, influenced by the decision in *Ang Seng Ho v PP*[1] where the High Court had briefly dealt with s 24(3) of the Act. There are two things I need say about that case. First, I think that the facts in that case are quite different. There, the charge was concerned with imitation goods. Here we are concerned with contaminated petrol. Secondly, the learned judge, while alluding to the necessity that there must be some further steps or inquiries, did specifically state what those further steps or inquiries should entail in the particular circumstances of that case. In his words 'the appellant must proceed further to enquire from his immediate suppliers whether the groundnuts were genuine at the time of taking delivery'.

In our case, the learned magistrate had stopped short of mentioning what further steps or inquiries the appellant was required to do in the circumstances of the case. I do not think that the learned magistrate had therefore applied the principle in *Ang Seng Ho*[1] correctly. In my view, she should have gone further by indicating, either generally or specifically, what those further steps or inquiries entailed having regard to the nature of the charge, the evidence adduced and the surrounding circumstances of the case. She had failed to do so. In summary therefore, she had failed to consider or consider adequately the statutory defence under s 24(3) of the Act. On this ground alone, I have no hesitation in allowing this appeal. I will therefore quash the conviction anad set aside the fine imposed by the magistrate's court.

Appeal allowed.

Reported by Anne Khoo